

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

BATES ENERGY OIL & GAS, LLC

v.

**COMPLETE OIL FIELD SERVICES
LLC AND SAM TAYLOR**

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CIVIL ACTION SA:17-CV-00808-XR

**COUNTER-PLAINTIFF COMPLETE OIL FIELD SERVICES LLC'S
REQUEST FOR ENTRY OF DEFAULT AGAINST COUNTER-DEFENDANTS TIER 1
SANDS AND THE BRAVO COUNTER-DEFENDANTS**

Pursuant to Rule 55(a) of the Federal Rules of Civil Procedure, Counter-Plaintiff Complete Oil Field Services, LLC ("COFS" or Counter-Plaintiff") respectfully requests an entry of default against Counter-Defendants Tier 1 Sands, LLC ("Tier 1"); and Unlimited Frac Sand, LLC, David Bravo and Lorena Silvestri Bravo (collectively, "Bravo" or the "Bravo Counter-Defendants"). In support of this request, COFS states the following:

I.

RELIEF SOUGHT AND PROCEDURAL BACKGROUND

1. COFs requests that, pursuant to Federal Rule Civil Procedure 55(a), the Court or Clerk of the Court enter a default against Tier 1 and Bravo who, although properly served, have not responded to COFS's most recent counterclaim, the Fourth Amended Counterclaim. As shown below, the deadline to answer or otherwise respond to the counterclaim was March 8, 2019.

2. On August 2, 2017, while this lawsuit was still in Texas state court, COFS filed its original counterclaim, naming Bates Energy Oil & Gas, LLC as the only Counter-Defendant, and alleging violations of Texas state law relating to a contractual escrow arrangement and escrow account.

3. On August 23, 2017, COFS removed this case to federal court. (Dkt. No. 1).

4. On September 8, 2017, COFS filed its **First Amended Counterclaim**, adding Dewayne Naumann and Equity Liaison Company as Counter-Defendants. (Dkt. No. 10).¹

5. On May 21, 2018, COFS filed and served its **Third Amended Counterclaim**, adding the remaining Counter-Defendants, including Tier 1 and Bravo. (Dkt. No. 68).²

6. On February 21, 2019, COFS filed its **Fourth Amended Counterclaim** adding and removing various claims and allegations, and the pleading was served on February 22, 2019. (Dkt. No. 116).³

7. The only Counter-Defendant who has filed an answer to the Fourth Amended Counterclaim is Mark B. Sylla. (Dkt. No. 117).

8. Neither Tier 1 nor Bravo, against whom an entry of default is requested herein, are minors, incompetent persons, or currently engaged in military service. Affidavit of Lisa Barkley. *See* FED. R. CIV. P. 55.

II.

STATUS OF SERVICE AND RESPONSE REGARDING EACH COUNTER-DEFENDANT

A. Tier 1

9. COFS added Tier 1 as a Counter-Defendant in its Third Amended Complaint. (Dkt. No. 68). COFS served Tier 1 with the Third Amended Complaint and the summons on June 13,

¹ A “second” First Amended Counterclaim was filed two days later, on September 11, 2017 (Dkt. No. 12). The refiling was a result of a deficiency notice notifying COFS that it had inadvertently used the state court style in the September 9 filing. (Dkt. No. 11). This mistake was corrected with the September 11 filing.

² No “Second” Amended Counterclaim was filed. Rather, the next counterclaim filed was the “Third Amended Counterclaim.”

³ *See* the ECF Notice of Electronic Filing, attached to the Affidavit of Lisa Barkley, which is attached as Exhibit 1. The Court granted COFS’s Motion for Leave to file the Fourth Amended Counterclaim on February 21, 2019, and all counsel were served with the pleading the next day, February 22, 2019 via ECF.

2018. (Dkt. No. 79). On June 29, 2018, counsel for Tier 1 filed its original answer.⁴ (Dkt. No. 85).

10. Counsel for Tier 1 was served with COFS's Fourth Amended Counterclaim through its legal counsel on February 22, 2019 via the ECF system. Consequently, Tier 1's deadline to file an answer or otherwise respond was March 8, 2019. *See* FED. R. CIV. P. 15(a)(3). Tier 1 has not answered or otherwise responded to the Fourth Amended Complaint.

B. The Bravo Counter-Defendants.

11. On June 18, 2018, David Bravo and United Frac Sand were served with the Third Amended Counterclaim. (Dkt. Nos. 79/98 and 79/99)

12. On August 9, 2018, David Bravo, Unlimited Frac Sand, and Lorena Silvestri Bravo all made an appearance in the lawsuit by filing an answer to the Third Amended Counterclaim. (Dkt. No. 102).⁵

13. The Bravo Counter-Defendants were served with the Fourth Amended Counterclaim on February 22, 2019, through their attorney, using the ECF system.

14. The Bravo Counter-Defendants neither answered nor otherwise respond to the Fourth Amended Counterclaim by their March 8, 2019 deadline.

III.
AUTHORITIES AND ARGUMENT

15. A default occurs when "a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules." *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996). Thus, "Federal Rule of Civil Procedure 55 requires the Clerk to enter a default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead

⁴ Tier 1's counsel is Morris E. "Trey" White III. (Dkt. No. 85).

⁵ Counsel for the Bravo Counter-Defendants is Austin Kaplan and Rob L. Wiley. (Dkt. No. 102).

or otherwise defend, and that failure is shown by affidavit or otherwise." FED. R. CIV. P. 55; *see also, Pichardo v. Lucky Cousins Trucking, Inc.*, No. 5-160CV-01248-RBF, 2019 U.S. Dist. Lexis 62469 (W.D. Tex. April 10, 2019).

16. As discussed above, COFS's service of its Fourth Amended Counterclaim was by use of the Court's ECF system, upon counsel of record for Tier 1 and the Bravo Counter-Defendants. "If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E)." FED. R. CIV. P. 5(b)(3). Here, in the Western District of Texas, Local Rule W.D. Tex. R. CV-5(b)(1) provides that "Pursuant to Section 15(a) of the Electronic Filing Procedures, the Notice of Electronic Filing ('NEF') generated by the court's electronic filing system constitutes service of the document on those registered as Filing Users." Because counsel for Tier 1 and the Bravo Counter-Defendants both filed their respective answers using the ECF system, they are necessarily "Filing Users." Consequently, service of the Fourth Amended Counterclaim under the Federal Rules of Civil Procedure was accomplished on February 22, 2019 by means of the ECF system.

17. Neither Tier 1 nor any of the Bravo Counter-Defendants filed a pleading or otherwise defended the allegations contained in the Fourth Amended Counterclaim. In particular, none of these Counter-Defendants filed an answer or other required pleading. Moreover, the Counter-Defendants did not take any action that indicated their intent to defend the suit (e.g., filing a motion under Rule 12 or a motion for summary judgment).

18. The time allowed to file a response to the suit expired on March 8, 2019. *See* FED. R. CIV. P. 15(a)(3).

19. The facts set forth herein are supported by the affidavit of Lisa S. Barkley, attached as Exhibit 1.

20. COFs requests that the Court or Clerk of the Court enter a default against Counter-Defendants Tier 1 Sands, LLC; David Bravo; Unlimited Frac Sand, LLC; and Lorena Silvestri who, although properly served, have not timely responded to COFS's Fourth Amended Counterclaim, and for such further relief as appropriate.

Dated: May 2, 2019

Respectfully submitted,

/s/ Lamont A. Jefferson

Lamont A. Jefferson

State Bar No. 10607800

Lisa S. Barkley

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**ATTORNEYS FOR DEFENDANTS
AND COUNTER-PLAINTIFF**

CERTIFICATE OF SERVICE

I certify that on this 2nd day of May, 2019, I electronically filed the foregoing instrument with the Clerk of the Court using the CM/ECF system and served the following counsel of record in accordance with the Federal Rules of Civil Procedure:

Michael D. Schwartz
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Counsel for Counter-Defendant Mark B. Sylla

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Counsel for Counter-Defendant Tier 1 Sands, LLC

The following parties were served with the foregoing instrument by certified mail, return receipt requested, at their last known address:

Bates Energy Oil & Gas, LLC
3201 Cherry Ridge
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San Antonio, Texas 78230

Equity Liaison Company
Dewayne Naumann
3303 Northland Drive
Suite 307
Austin, Texas 78721

Howard Resources, LLC
1308 CR 905A
Joshua, Texas 76058

/s/Lisa S. Barkley
Lisa S. Barkley